

OCT 9 1942

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Supreme Court of the United States

OCTOBER TERM, 1942.

451

No. _____

NORMAN BAKER, PETITIONER AND APPELLANT,
VS.

WALTER A. HUNTER, SUCCESSOR TO ROBERT H.
HUDSPETH AS WARDEN OF UNITED STATES
PENITENTIARY, LEAVENWORTH, KANSAS,
RESPONDENT AND APPELLEE.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE TENTH CIRCUIT**

and

BRIEF IN SUPPORT THEREOF.

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INDEX

PETITION

I. Summary Statement of Matters Involved	1
II. Basis of Court's Jurisdiction	6
III. Questions Presented	6
IV. Reasons for Allowance of Writ	9
Prayer for Writ	10

BRIEF FOR PETITIONER

(A) Opinion of Lower Court	11
(B) Grounds for Invoking Jurisdiction of This Court	11
(C) Statement of the Case	12
(D) Errors Assigned	12
(E) Summary of Argument	14

Argument—

I. Infringement of the constitutional right to fair trial	18-19
Unauthorized communications by the United States Marshal to the jurors	19
Misconduct of deputy marshals with jury	22
Use of intoxicants by jurors	23
II. Employe of Government in the very department concerned with the alleged crime, not an impartial juror	31
III. Denial of a full hearing: Exclusion of evidence to prove vital element of the defense	35
Conclusion	42

TABLE OF CASES

Akron C. & Y. R. Co. vs. U. S., 261 U. S. 184, 43 S. Ct. 270, 67 L. Ed. 605-614	36
Annotations in 22 A. L. R. 254, 34 A. L. R. 103, and 62 A. L. R. 1466	29
Bob White vs. Texas, 310 U. S. 530-533, 84 L. Ed. 1343, 60 S. Ct. 1032	18
Bowen vs. Johnston, 306 U. S. 19, 26, 83 L. Ed. 455	40
B. & O. R. Co. vs. U. S., 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797	36
Brown vs. Mississippi, 297 U. S. 278, 80 L. Ed. 682, 56 S. Ct. 461	18
Carey vs. Brady, 125 F. 2d 253	41
Chambers vs. Florida, 309 U. S. 227, 241, 84 L. Ed. 716, 724, 60 S. Ct. 472	18
Clarke vs. Huff, 119 F. 2d 204	42
Clements vs. Commonwealth, 6 S. W. 2d 483	29
Comm. vs. Fisher, 226 Pa. 189, 75 Atl. 204, 26 L. R. A. (N. S.) 1009	26
Comm. vs. Roby, 12 Pick. 496	26
Corley vs. State, 162 Ark. 178, 257 S. W. 750	35
Crawford vs. U. S., 212 U. S. 183, 53 L. Ed. 485, 29 S. Ct. 260	16, 32, 33, 34, 36
Curtis vs. Rives, 123 F. 2d 936	42
Edwards vs. U. S., 312 U. S. 473, 85 L. Ed. 957, 61 S. Ct. 669 (Mar. 3, 1941)	18, 37
Ex parte Nielsen, 131 U. S. 176, 33 L. Ed. 118-120	40
Fillippon vs. Albion Vein Slate Co., 250 U. S. 76, 63 L. Ed. 853	20, 21
Furness W. & Co. vs. Yang Tsze Ins. Asso., 242 U. S. 430, 61 L. Ed. 409-414	18
Ga. R. & E. Co. vs. Decatur, 295 U. S. 165, 79 L. Ed. 1365-1370, 55 S. Ct. 701	37
Garrison vs. Hudspeth, 108 F. 2d 733	42
Glasser vs. U. S., 86 L. Ed. Adv. Op., p. 405 (Jan. 19, 1942)	18, 38
Herndon vs. Lowry, 301 U. S. 242, 81 L. Ed. 1066, 57 S. Ct. 732	18
Hudspeth vs. McDonald, 120 F. 2d 962-965	18, 40

INDEX

III

Huntley vs. Schilder, 125 F. 2d 250	40
Hutchins vs. State, 140 Ind. 78, 39 N. E. 243	27
Johnson vs. Zerbst, 304 U. S. 458, 82 L. Ed. 1461, 58 S. C. 1019	18, 38
Klose vs. United States, 49 F. 2d 177	29
Knight vs. Inhabitants of Freeport, 13 Mass. 218	26
Lane vs. State, 168 Ark. 528, 270 S. W. 974	35
Lavalley vs. State, 188 Wis. 68, 205 N. W. 412	26-27, 29
Lisenba vs. People of the State of California, (Dec. 8, 1941) 86 L. Ed. Adv. Op., p. 179	18, 38
Lynch vs. Kleindolph, 204 Iowa 762, 764, 216 N. W. 2, 55 A. L. R. 745	25
Matter of Moran, 203 U. S. 96-105	41
Mattox vs. U. S., 146 U. S. 140-151, 13 S. Ct. 50, 36 L. Ed. 917	25, 28, 29
McMicking vs. Shields, 238 U. S. 99	41
Meyer vs. State, 19 Ark. 156	35
Mooney vs. Holohan, 294 U. S. 103, 79 L. Ed. 791, 55 S. Ct. 340, 98 A. L. R. 406	18, 38
Moore vs. Alderhold, 108 F. 2d 729	42
Moore vs. Dempsey, 261 U. S. 86, 67 L. Ed. 543, 43 S. Ct. 265	18
Neilsen, In re, 131 U. S. 176, 33 L. Ed. 118, 9 S. Ct. 672	18
Parfet vs. Kansas City Life Ins. Co., 128 F. 2d 361	20
Quercia vs. U. S., 289 U. S. 466, 77 L. Ed. 1321	19
Ray vs. United States, 114 F. 2d 508	29
Salinger vs. Loisel, 265 U. S. 224, 68 L. Ed. 989	39
Salyers vs. Commonwealth, 118 S. W. 2d 208	29
Shapiro vs. King, 125 F. 2d 890	39
Shefelker vs. First National Bank of Marion, 212 Wis. 659, 250 N. W. 870-872	26, 27
Shepard vs. U. S., 290 U. S. 96, 78 L. Ed. 197, 54 S. Ct. 22	37
Sinclair vs. U. S., 279 U. S. 749, 73 L. Ed. 946, 49 S. Ct. 471	30
Smith vs. O'Grady, 312 U. S. 329, 85 L. Ed. 859	18, 38
Smith vs. Texas, 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84	18
State vs. Ferguson, 48 S. D. 346, 204 N. W. 652-660	28
State vs. Murphy, 17 L. R. A. (N. S.) 609	21, 22

State vs. Neville, 227 Iowa 329, 288 N. W. 83.....	25
State vs. Osler, 228 N. W. 251.....	26
State vs. Smith, 56 S. D. 238, 228 N. W. 240.....	26, 29
State vs. Wroth, 15 Wash. 621, 47 Pac. 106.....	21
Stone vs. U. S., 113 F. 2d 70.....	24, 25, 28, 29
Sutherland vs. State, 76 Ark. 487, 89 S. W. 462.....	23
U. S. vs. Ball, 163 U. S. 662, 41 L. Ed. 300.....	30
U. S. vs. Wood, 299 U. S. 123, 81 L. Ed. 78.....	16, 31, 32, 33, 34
Village of Bangor vs. Hussa C. & P. Co., 208 Wis. 191, 242 N. W. 565.....	27
Walker vs. Johnston, 312 U. S. 275, 85 L. Ed. 830-836, 61 S. Ct. 574.....	18
Washington ex rel. Fairchild, 224 U. S. 510, 56 L. Ed. 863, 32 S. Ct. 535.....	37
Wong Doo vs. U. S., 265 U. S. 239, 68 L. Ed. 999.....	39

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RESPONDENT AND APPELLEE.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and

To the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Norman Baker, respectfully shows:

I. SUMMARY STATEMENT OF MATTERS INVOLVED.

Petitioner is a prisoner of the United States at Leavenworth, Kansas, under sentence of four years imprisonment imposed by the United States District Court at Little Rock, Arkansas, for violation of 18 U. S. C. A. 338 (use of

the mails to effectuate a scheme to defraud) (*Baker v. U. S.*, 115 F. 2d 533) (Certiorari was refused by the United Supreme Court, 31a U. S. 692) and brought this action in habeas corpus in the United States District Court for the District of Kansas.

Respondent was Warden of the United States Penitentiary at Leavenworth to whom Petitioner was committed on March 22, 1941, and by answer denied the allegations of the complaint, but has been succeeded by Walter A. Hunter as such warden.

Trial was had to that court at Kansas City on July 22, 1941 (Rec. 430). Judgment was rendered on October 24, 1941, discharging the writ of habeas corpus and remanding Petitioner to the custody of the Respondent (Rec. 87-89).

Thereafter appeal was duly taken to the United States Circuit Court of Appeals for the Tenth Circuit (Rec. 89) and on the 9th day of July, 1942, that court rendered judgment affirming the judgment of the District Court (Rec. ____).

Thereafter and within the time allowed by rule for petition for rehearing as extended by order of the Court to August 24, 1942 (Rec. ____), Petitioner filed his petition for rehearing.

The Tenth Circuit Court of Appeals entertained the petition for rehearing but denied it on the 2nd day of September, 1942, without opinion (Rec. ____) and this petition for certiorari is filed to obtain a review of the judgment and decision of the Circuit Court of Appeals for the Tenth Circuit, which opinion appears in 129 F. 2d 779.

The petition for the writ of habeas corpus alleged and the findings of the District Court and of the Circuit Court of Appeals or the uncontradicted evidence definitely established the following facts: Upon the trial of the case of *U. S. v. Baker et al.*, in the United States District Court which issued the commitment in question

here, at the beginning of the trial, the court ordered the jury segregated during the trial of the case (Rec. 82, last paragraph). Two men unconnected with the marshal's office were selected as bailiffs, sworn, and took charge of the jury as such (Rec. 96 and 413), one by day and one by night. Marshal Pettie engaged quarters for the jury at a nearby hotel and at the close of the Court the first day called the jury together at the hotel and gave them orders not to discuss the case among themselves nor with any third persons (Rec. 402, last ten lines; p. 161, middle of page). He told them that the case was one of unusual importance (Rec. 166, l. 7, p. 173, middle, p. 190, bottom of page). He told them that the government had spent thousands of dollars (Rec. 173) or a large amount of money in preparation for the trial (Rec. 173, ll. 24 to 30; 190, last half of page; 214, first paragraph). He told them that he didn't want "no mistrial" (Rec. 224, ll. 5 to 10; 396, first paragraph; 398, 9th line from the bottom; 402, lower part of page).¹

During the trial seven deputy marshals, including two refined, educated, and highly entertaining (Rec. 167, l. 34) lady deputies mixed and mingled with the jury freely, taking mail to the jurors' individual rooms and delivering it to them in person (Rec. 276, lower half of page), and socially drinking with the jurors in their hotel rooms.

On two occasions these ladies ate dinner with the jury, talking constantly and making merry during the meal time (Rec. 294, l. 8; 337, ll. 8 to 10) and drinking highballs with them before dinner (Rec. 279, 282, 291). They went to the jurors' quarters after dinner and played poker (penny ante) with jurors (Rec. 283, l. 2; 290; 333; 335). They entertained and visited with the jurors

¹"The first time they were in the rooms occupied by Mr. Smith and Mr. Shook, they were talking and we had a little cocktail * * * the ladies were drinking cocktails when I went in" (Rec. 174). This was denied.

two entire evenings (Rec. 278, 279, 333, 415, 416, 422). On other occasions the ladies were visiting and drinking with the jurors (Rec. 174).

Various deputies, with a bailiff accompanying, took the jurors to church, to a basketball game, to a picture show, and to the zoo (Rec. 83); Deputy Marshal McBurnett, **without the knowledge of the bailiff in charge** (Rec. 347, ll. 15 to 32) took one of the jurors out to the juror's farm by automobile, a trip occupying one and a half hours, during which the juror and Deputy McBurnett were together in his car with **no one else present** (Rec. 360). Deputy marshals also took the jurors to barbershops, stores, hotels, etc. Wives of at least two of the jurors had meals with their husbands at the hotel and the wives of some of the jurors were allowed to telephone to them while the bailiff was in the hearing of the husband but **could not hear what the wife said** (Rec. 343, ll. 2 to 6).

During the trial Bailiff Thompson procured and furnished to some of the jurors, four quarts of whisky (Rec. 148, l. 25; 154, middle of page), and on two or three occasions brought them an additional pint or two of liquor, all for use as a beverage (Rec. 101, l. 20).

The jurors were allowed to purchase whisky *ad libitum* (Rec. 369, l. 14) from the bellboys and porter of the hotel without the presence of the bailiff (Rec. 124, middle of page; 179), getting a pint of whiskey at a time. At least eleven quarts of whisky were consumed by the jury during the two weeks' trial, although it was not shown that any of the jurors became visibly intoxicated.

The opinion of the Court of Appeals implied that the things done by the marshal and his deputies in connection with the jury (drinking whisky, eating, making merry, visiting at their hotel, and playing poker with them), were done as a part of their official duties as marshal and deputies—129 F. 2d 782 (10)—and held they were not prejudicial to Petitioner.

The Circuit Court of Appeals held that Petitioner requested the marshal to take charge of the jury (Op. p. 2)

but there was absolutely no evidence of such a request. The evidence did show that Attorney Isgrig requested the marshal to appoint Deputy Marshal Bradley as bailiff to have charge of the jury (Rec. 435), but that Marshal Pettie refused to do so but did place Bradley in charge of the **bailiffs**.

The Court also held that the attendance of the jury at church, basketball game and the zoo, was pursuant to agreement of the parties, but the great preponderance of the evidence is contrary to that holding (Rec. 242, 436, 445).

The Court found and the undisputed evidence showed that one of the jurors upon the trial of Petitioner, was an employe of the United States, being Assistant United States Postmaster at Herbine, Arkansas, and that upon *voir dire* when asked on direct examination by the court and on cross examination by counsel for defendants as to his business or occupation, stated that he was a farmer and merchant and did not disclose but, by his answer, concealed the fact that he was in the employ of the United States as Assistant United States Postmaster. The Circuit Court of Appeals then held that such employment did not render him incompetent to serve as a juror (129 F. 2d 779-783).

The undisputed evidence showed that, upon the trial of the case at Little Rock, Petitioner offered and sought to introduce competent evidence for the expressly limited purpose of showing good faith upon his part (Rec. 452 and 25 to 38), which evidence was vital to his defense. Forty-six witnesses for defendants testified that they had been treated and cured of various ailments which included cancer, at the Baker Hospital. Two Hundred cured patients would have been called, but the Court refused defendants the right to call any more. It was vital to show that defendants believed their treatment would cure cancer (Rec. 51, top of page). Defendants offered to prove by several of these cured patients, that

on coming to the Baker Hospital they gave case histories and diagnoses of their home doctors having no connection with the hospital, who had examined them before going to Baker Hospital which showed they had cancers (Rec. 452 and 25-38), and that these diagnoses and case histories were communicated to defendants and entitled to belief by them (Rec. Same). The Trial Court refused to permit the introduction of that evidence (Rec. 25 to 32). The Circuit Court of Appeals held that the refusal to permit the introduction of competent evidence was a **mere error** of the court which could be reviewed only upon appeal, and that it did not constitute an infringement of Petitioner's constitutional rights (Rec.; 129 F. 2d 783) which would vitiate the sentence.

II. BASIS OF JURISDICTION.

This petition for certiorari is brought under Sec. 240 of the Act of February 13, 1925, and F. C. A., Tit. 28, Sec. 347 (a) and Sec. 463 (c),² and the case is a case in a circuit court of appeals within the meaning of Section 347 (a).

III. IMPORTANT FEDERAL QUESTIONS RAISED ARE AS FOLLOWS:

1. Is compliance with the constitutional mandate, requiring that defendant in a criminal case in the United States courts be given a full hearing and a fair trial before an impartial jury, an essential jurisdictional prerequisite to that court's authority to deprive him of his liberty?

1(a). In the trial of a criminal case in the federal court where the jury has been segregated by order of the court and placed in charge of two bailiffs duly sworn

²463 (c) "Sections 346 and 347 of this title applicable. Sections 346 and 347 of this title shall apply to habeas corpus cases in the circuit courts of appeals and in the United States Court of Appeals of the District of Columbia as to other cases therein."

for that purpose, are defendants' constitutional rights infringed or violated by the action of the United States Marshal during the trial in calling the jury together at their hotel quarters in the absence of the defendant and without the knowledge of the defendants or of the court and giving them orders not to discuss the case among themselves or with third persons; telling the jury that the case is one of unusual importance; telling them that the government has expended large amounts of money—thousands of dollars—in preparation for the trial; telling them that the marshal does not want any mistrial of the case? Are such actions of the marshal any part of his official duties as marshal?

1(b). Under the circumstances stated, are defendants' constitutional rights to a fair trial violated and infringed by conduct of deputy marshals, including two entertaining young lady deputies, in mixing and mingling freely with the jurors at their hotel quarters during the trial, eating meals including a birthday dinner and making merry with them, visiting, entertaining, drinking intoxicating liquor and playing poker with them two entire evenings, all without the knowledge or consent of the trial judge or of the defendants or their counsel? Or by the acts of bailiffs and deputies in procuring and allowing the jury to procure and drink, as a beverage, large quantities of intoxicating liquor to-wit: whiskey, the jurors being allowed to communicate freely with bell boys and porters in the absence of the bailiffs? Are such acts part of their official duties as deputy marshals?

1(c). Under such circumstances, are defendants' rights to a fair trial and due process of law violated or infringed by the action of a deputy marshal in taking one of the jurors on an hour and a half trip by automobile to the juror's farm without the knowledge of the bailiff in charge, where the juror was alone with such deputy for the entire trip? Is such conduct part of the official duties of such deputy marshal?

1(d). Under the circumstances stated, are defendants' constitutional rights to a fair trial and to due process violated or infringed by the conduct of the deputy marshals as such accompanying the jury to church, to a picture show, to a basketball game, to the zoo, and to a neighboring army camp, and taking some of the jurors to barbershops, stores and hotels separate from the jury as a whole without the knowledge or consent of defendants?

2. Would the natural tendency of the acts and conduct by employes of the United States, as recited in questions 1 to 1(d), be to consciously or unconsciously produce a mental attitude on the part of jurors favorable to the United States and therefore prejudicial and unfair to the defendants; thereby giving rise to a presumption that defendants' right to a fair trial was impaired or infringed?

3. Was Petitioner deprived of his constitutional right to trial by an impartial jury, by the fact that one of the jurors was an employe of the United States in the very department concerned with the alleged crime, which fact was not disclosed by said juror when cross examined as to his occupation and was not known to the Petitioner or his attorneys until a year after the trial?

4(a). Was Petitioner's constitutional right to a fair trial and a full hearing infringed by the trial court's erroneous refusal to permit Petitioner to introduce competent evidence vital to his defense of good faith?

4(b). Is such a refusal a mere "technical error" within the meaning of Tit. _____, Sec. _____, of F. C. A., or does such infringement by the United States District Court of defendant's constitutional right to a fair trial and a full hearing, vitiate or invalidate a sentence resulting therefrom?

4(c). Where defendants' rights to a fair trial and a full hearing in a criminal case have been infringed by

the trial court's refusal to permit defendant to introduce competent evidence to sustain his defense of good faith, will his right to relief by habeas corpus be defeated by the fact that the erroneous ruling of the trial court may have been subject to review on appeal, especially where on appeal the Circuit Court of Appeals overlooked the purpose to which the evidence was specifically limited and by oversight or neglect, failed to correct such error?

IV. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Court erred in deciding each of the foregoing questions adversely to Petitioner.

Questions 1(a) to 1(d) and 2 are important questions of federal law which have not been but should be settled by this Court. The Circuit Court of Appeals decided these questions in a way probably in conflict with **applicable** decisions of the Supreme Court. The decision of the Tenth Circuit Court of Appeals has sanctioned such a departure by the lower court from the accepted and usual course of judicial procedure as to call for the exercise of this Court's power of supervision (See cases in Brief Div. I).

Question 3 is an important question of federal law which was broached but not decided by the Supreme Court itself in *U. S. v. Wood*, 299 U. S. 123, 81 L. Ed. 78, and should be settled by the Supreme Court.

Question 4(a) is an important question of federal law upon which the Circuit Courts of Appeal are divided and which the Supreme Court should definitely settle (See Cases Brief Div. III).

Question 4(b) was decided by the Circuit Court of Appeals in a way probably in conflict with applicable decisions of this Court and in conflict with its own decisions and decisions of other Circuit Courts of Appeal.

Question 4(c) presents an important question of federal law decided by the Circuit Court of Appeals in a way probably in conflict with applicable decisions of this Court.

Wherefore, Your Petitioner prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Tenth Circuit commanding said court to certify and send to This Court a full and complete transcript of the record of the proceedings of said United States Circuit Court of Appeals for the Tenth Circuit had in Cause No. 2475 and entitled on its docket "*Norman Baker, Appellant, v. Robert H. Hudspeth, Warden, United States Penitentiary, Leavenworth, Kansas, Appellee,*" to the end that this cause may be reviewed and determined by This Court as provided for by the Statutes of the United States; and that the judgment herein of said United States Circuit Court of Appeals be reversed by This Court, and for such further relief as to this Court may seem proper.

Dated October 1st, 1942.

Norman Baker,
By A. G. BUSH,

Counsel for Petitioner.

A. G. BUSH,
Of Counsel.